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# THE CHANCELLOR'S GHOST

G. EDWARD WHITE\*

## I

In the imagined encounters one has with figures from the past, how might James Kent appear? Some might find it slightly awkward to visualize that bookish gentleman at a social function in the last years of the twentieth century. If through some transmogrification process Kent appeared among the early arrivals at a cocktail party, his presence would probably not light up the gathering. Although some sages possess a sparkling wit, in the learned and lucidly written works of Kent, and in any moderate-sized sampling of his correspondence, there is precious little evidence of that. Uncharitable members of the current generation of law students, if they could conceive of Kent as one of their contemporaries, might be inclined to apply the adjective "nerdy."

Of course the above says more about us than about Kent, and this essay is about both those entities. One cannot wrest someone from a distant point in time and deposit that person in the present, at least not in the world of nonfiction. Social roles shape the development of humans as well as temperament. Even had Kent wanted to be a basketball player, or a software designer, or a legislative assistant to Newt Gingrich, those roles were not available to him. He might well have been interested in the last two; surely not the first. So in a sense it is pointless to speculate how Kent might appear to us today. But in another sense it is well worth considering why we choose to commemorate him at all. Is it just fortuitous, for example, that there are Chancellor Kent Professorships at two major law schools, and another named for him, when there is no comparable recognition for Kent's mentor and early role model, Alexander Hamilton? What is it about Kent that makes him a figure that continues to interest and to impress us?

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In this vein, one needs to consider Holmes's assessment. "I . . . have to keep a civil tongue in my head when I am [Kent's] valet," Holmes wrote to John Norton Pomeroy in 1872, when Holmes was immersed in preparing the twelfth edition of Kent's *Commentaries on American Law*. Kent, Holmes continued, "has no general ideas, except wrong ones."<sup>1</sup> By that statement Holmes, who was launched on his project to produce a historically and philosophically grounded overview of Anglo-American law, meant that Kent's *Commentaries*<sup>2</sup> amounted to a collection of black-letter doctrinal syntheses overgirded with what Holmes liked to call "benevolent yearnings" for an idealized prepolitical jurisprudential and social universe.<sup>3</sup> In short, Kent, for Holmes, was a small-time jurist invested in an obsolescent ideological agenda.

One also needs to consider the absence of a recent biography of Kent. John Langbein recently described John Norton's 1939 biography as being "adulatory," unaware of several important sources, and "insensitive to the main currents of American legal history." Yet despite the cogency of Langbein's statement that "Kent is about due for a serious biography," none has appeared.<sup>4</sup> Can it be that close exposure to the Chancellor has a disaffecting, or even a numbing, effect?

The above case against Kent as a figure of potential current interest need not detain us very long. For starters, the late 1990s

1. Letter from Oliver Wendell Holmes, Jr. to John Norton Pomeroy (May 22, 1872), *microformed on THE OLIVER WENDELL HOLMES, JR., PAPERS* (University Publications of Am. 1985); see also MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882*, at 16 (1963) (quoting letter); G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 125 (1993) (same).

2. JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (Da Capo Press reprint 1971) (1826-1830). For a discussion of Holmes's experiences editing the twelfth edition of Kent's *Commentaries*, which were not wholly positive, see WHITE, *supra* note 1, at 124-27.

3. Holmes described the maxim *sic utere tuo ut alienum non laedas* (use your property in such a way as not to injure that of another) as a "benevolent yearning." Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894). For confirmation of Kent's investment in a set of ideas that allow him to be described as a representative of late eighteenth- and early nineteenth-century Federalist thought, see JOHN THEODORE HORTON, *JAMES KENT: A STUDY IN CONSERVATISM 1763-1847* (1939); and John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 549-50, 554-69 (1993).

4. See Langbein, *supra* note 3, at 548 n.4. A person eminently qualified to produce an authoritative biography of Kent, Professor Donald Roper, has apparently decided not to undertake that project. See, e.g., Donald M. Roper, *The Elite of the New York Bar as Seen from the Bench: James Kent's Necrologies*, 56 N.Y. HIST. SOC'Y Q. 199 (1972) [hereinafter *Kent's Necrologies*]; Donald M. Roper, *Justice Smith Thompson: Politics and the New York Supreme Court in the Early Nineteenth Century*, 51 N.Y. HIST. SOC'Y Q. 119 (1967); Donald M. Roper, *The New York Supreme Court and Economic Development, 1798-1823*, in 3 *WORKING PAPERS FROM THE REGIONAL ECONOMIC HISTORY RESEARCH CENTER* 58 (Glenn Porter & William H. Mulligan, Jr., eds., 1980).

ought to find his entrepreneurial spirit inspiring. Although Kent's family background was socially and intellectually formidable,<sup>5</sup> the Revolutionary War adversely affected his father's finances, resulting in his being obligated to pursue a profession as a way of achieving financial security.<sup>6</sup> Although he benefited from the auspices of a series of patrons, he was never able to achieve other than a modest financial success as a young lawyer<sup>7</sup> or subsequently as a law professor at Columbia.<sup>8</sup> Undaunted, Kent used the stipend from his Columbia position to engage in land speculation, which shortly brought him financial security,<sup>9</sup> and ultimately, in large part because of the income from his *Commentaries*, died one of the wealthiest New Yorkers of his time.<sup>10</sup>

So the Chancellor as entrepreneur should resonate. In addition, the historiographical paradigms of the early nineteenth century have decisively shifted, seemingly to Kent's advantage. At the time Horton's biography appeared the axes of early Republic historiography pivoted around whether a figure was a "nationalist," or a member of the "propertied" (as distinguished from the property-less) classes, or an "aristocrat" as opposed to a "democrat."<sup>11</sup> On the whole, one's reputation was more likely to endure if one were not conspicuously "nationalistic," "propertied," or "aristocratic." Kent

5. Kent's paternal grandfather and father attended Yale, as he did, see Langbein, *supra* note 3, at 550-51; his father, at one point, had sufficient means to live as a gentleman farmer and occasional lawyer in upstate New York, see *id.* at 550.

6. Kent's early life was also complicated by the illness and eventual death of his mother when he was a very young child. After being born near Poughkeepsie, New York in 1763, at the age of five he was sent to live with his maternal grandfather in Norwalk, Connecticut. His mother died when he was seven, and at nine he was sent to the Reverend Ebenezer Baldwin's school in Danbury. After the outbreak of hostilities with England that culminated in the Revolutionary War, Baldwin enlisted in the American cause as a war chaplain, and in 1776 died as a result of contracting a disease in camp. The following year Kent, at the age of 14, enrolled in Yale College, graduating with the class of 1781. During Kent's years at Yale, British troops occupied New Haven and burned Kent's grandfather's Norwalk home in 1779. Yale College students were forced to vacate New Haven as a result of the British presence, and Kent took the opportunity to "retire . . . to a country village," where he began reading the fourth volume of SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (Oxford, Clarendon Press 1766). See Langbein, *supra* note 3, at 549-52.

7. Kent began practice in Poughkeepsie, New York in 1785 at the age of twenty-one. See Langbein, *supra* note 3, at 554.

8. After his second year of lectures, in 1795, he had only two students, and after his third year none. See *id.* at 559-60.

9. See *id.* at 560 n.64 and accompanying text.

10. On the details of Kent's early career, see *id.* at 549-55; on Kent's wealth at his death, see Edward Pessen, *The Wealthiest New Yorkers of the Jacksonian Era: A New List*, 54 N.Y. HIST. SOC'Y Q. 145, 168 (1970).

11. For an example of that sensibility, see Max Lerner, *John Marshall and the Campaign of History*, 39 COLUM. L. REV. 396 (1939).

appeared to be all three, and Horton's obvious sympathy for the Chancellor in those capacities only served to isolate Horton.<sup>12</sup> Now, thanks to Bernard Bailyn, Gordon Wood, J.G.A. Pocock, and a number of other scholars, a cohort of late eighteenth- and early nineteenth-century republican theorists has been placed in a less "progressive" and more nuanced historical setting.<sup>13</sup> Kent's Federalism, or his elitism, or his wealth, or his forebodings about majoritarian democracy are no longer the inevitable basis for a caricatured portrait, or, worse, the implicit dismissal of a figure who no longer interests.<sup>14</sup>

Then there is, finally, the Chancellor as cyberspace pioneer. Well, not exactly a "trekkie" in cyberspace, but one exploring new frontiers in the dissemination of ideas. As an analogical figure the Chancellor begins to become luminous when one thinks about his launching his previously unreported decisions, and his previously unsystematized doctrinal simplifications, into a frontier void. Imagine a world of lawyers and prospective lawyers, with a growing population to serve and the exceptionalist litigiousness of American culture swelling up, and yet with almost no law books. Imagine a jurisdiction with no reported decisions to guide it, let alone any written briefs. Imagine the only written source of law, apart from that remote and mysterious document the Constitution, being a dog-eared copy of Blackstone, someone who had written his *Commentaries* for a nation whose political and social culture America was officially rejecting and whose legal culture was becoming increasingly foreign. Imagine, finally, almost no institutions devoted toward full-time legal

12. I presented a paper at a faculty workshop at the Department of History of the State University of New York ("SUNY") at Buffalo in 1969. Horton and David Hollinger were both members of the SUNY history faculty at the time. It was obvious to me, at any rate, whose star was taken as rising and whose as setting. Compare the biographical treatments in HORTON, *supra* note 3, and DAVID HOLLINGER, MORRIS COHEN AND THE SCIENTIFIC IDEAL (1968).

13. See generally BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); BERNARD BAILYN, ORIGINS OF AMERICAN POLITICS (1968); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT (1975); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969); Gordon S. Wood, *Democracy and The American Revolution*, in DEMOCRACY: THE UNFINISHED JOURNEY 508 BC TO AD 1993, at 97 (John Dunn ed., 1992). For additional contributions, see the sources cited in G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835, at 11-75 (abr. ed. 1991) [hereinafter, THE MARSHALL COURT AND CULTURAL CHANGE]. For an application of much of that scholarship to Kent, see generally David W. Raack, "To Preserve the Best Fruits": The Legal Thought of Chancellor James Kent, 33 AM. J. LEGAL HIST. 320 (1989).

14. Consider Kent Newmyer's resuscitation of Kent's ideological ally, Joseph Story, in R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985). Whatever adjective might have been applied to Story at the height of "progressive" historiography's dominance, it would not have been "statesman."

education: "law schools" whose students dipped in and out of lectures like today's U.K. students preparing for their comprehensives, and for whom virtually nothing—no meaningful degrees, no admission to a bar, no systematic course of education—followed from their enrollment.

Small wonder that when, in 1826, Kent decided to abandon law teaching for the last time<sup>15</sup> and to publish the lectures he had written at Columbia between 1824 and that year as *Commentaries on American Law*,<sup>16</sup> he never had to rely on real estate speculation for income again. Kent himself had prepared the way for the incredible commercial and juristic success of his *Commentaries*. He began that preparation by securing a series of judicial positions, all through the intervention of his Poughkeepsie friend and neighbor John Jay, who resigned as Chief Justice of the United States in 1796—the same year no Columbia students signed up for Kent's law lectures—to run, successfully, for the Governorship of New York. Jay appointed Kent, successively, to the position of Master in Chancery, Recorder of New York City (the equivalent of a municipal court judgeship), and Associate Justice of the Supreme Court of New York, the last in 1798.<sup>17</sup> Despite that court's nomenclature, it was a trial court, consisting of five judges who not only sat collegially for brief sessions in Albany and New York City, but also rode circuit to hold individual trials.<sup>18</sup> Kent remained on the Supreme Court, becoming its Chief Justice in 1804, until 1814, when he had reached the age of fifty.<sup>19</sup>

In 1814 Kent was appointed Chancellor of New York, a position

15. Kent had rejoined the Columbia faculty, occupying his former professorship, which Columbia had left unfilled after his 1797 resignation, in 1823. He had been elected to that position in November 1823 and began lecturing in February 1824. He continued his lectures through the 1825-1826 academic year. By 1826 the first volume of his *Commentaries* had been published, and the immediate commercial success of that volume apparently convinced Kent that he, and law students, would be better served if he stopped lecturing and referred interested students to his printed volumes. For the remainder of his life he retained a titular association with Columbia but never lectured there or attended faculty meetings and did not receive any salary. See JULIUS GOEBEL, JR., A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 18-22 (1955); Francis M. Burdick, *The School of Law*, in A HISTORY OF COLUMBIA UNIVERSITY 1754-1904, at 341 (1904); Langbein, *supra* note 3, at 564-65.

16. The first edition of Kent's *Commentaries*, which appeared in four volumes, was published between 1826 and 1830. Between 1830 and Kent's death in 1847, at the age of 84, the work went through five additional editions. Its last edition, the fourteenth, appeared in 1896. See Langbein, *supra* note 3, at 565 (citing 293 AMERICAN LIBRARY ASS'N, THE NATIONAL UNION CATALOG: PRE-1956 IMPRINTS 475-78 (1973)).

17. See Langbein, *supra* note 3, at 561.

18. For more details on the distinctive New York state court system of the late eighteenth and early nineteenth centuries, see *id.* at 562-63; and sources cited therein.

19. See *id.* at 564.

he held until he was forced to retire from it in July 1823, when he turned sixty. The position of Chancellor was an unusual one for an early nineteenth-century American state court system. It reflected the fact that New York, like England but unlike most American jurisdictions, separated its common law and equity courts. The New York Chancery Court was a trial court, based in Albany but meeting twice a year in New York City.<sup>20</sup> It was composed solely of Kent during his years as Chancellor,<sup>21</sup> and although its jurisdiction was confined to equity cases, it provided Kent with a seat on the New York Council of Revision, a unique governmental body created by the New York Constitution of 1777 which, even though some of its members were legislators, reviewed and vetoed legislative bills on constitutional and other grounds.<sup>22</sup>

All of this added up to more than twenty-five years of judicial work, and Kent took full advantage of it. Once secure as a judge (New York judges were appointed until the age of sixty), he began to maximize the considerable intellectual talents that had resulted in his standing first in his Yale college class, beginning to read law at the age of sixteen,<sup>23</sup> and being offered Columbia's initial professorship of law (despite only having practiced law in New York for six months, and that without much success) at thirty.<sup>24</sup> By the time he accepted the temporarily ill-fated Columbia professorship, Kent was already not only an inveterate reader and creative synthesizer of legal sources, he was a gifted synthetic writer, capable of exhibiting clarity, precision, and what might be termed a stimulating reach in his legal prose. His was a mind whose influence was bound to expand when its thoughts were disseminated in the written discourse of his profession, and he was well aware of his gifts.

## II

Judging, researching, and writing were thus all of a piece for Kent from the moment he had the opportunity to render opinions. But he was adversely affected, at the time he joined the Supreme Court of New York, by the absence of a tradition of written opinions

20. *See id.* at 563.

21. *See id.* at 562.

22. *See* HORTON, *supra* note 3, at 232-63 (discussing abolition of the Council of Revision and Kent's ongoing involvement with New York politics); Langbein, *supra* note 3, at 563.

23. *See* Langbein, *supra* note 3, at 551-52.

24. *See id.* at 558.

and by the nonexistence of any volumes of reported New York decisions. Here again one has to make imaginative leaps from today's information-glutted world. In 1798 most American judicial decisions, state or federal, were orally delivered and unreported. There were no official state reports in any jurisdiction until 1804. The few state and federal cases that were reported appeared in privately published volumes, such as Ephraim Kirby's Connecticut reports, Alexander Dallas's miscellaneous collection of cases from the Supreme Court of Pennsylvania and the Supreme Court of the United States, and William Coleman's selection of New York decisions.<sup>25</sup> These private reports—even Dallas's, which are now treated as the official *U.S. Reports*—were merely impressionistic renderings of cases a given reporter happened to think worth including, sometimes because written opinions had been rendered in them, sometimes because the reporter—invariably himself a lawyer or judge—happened to be in court when an oral opinion was delivered or to have argued the case himself.<sup>26</sup>

Kent set out to remedy this situation. He first began to produce written opinions in all the cases he decided on the Supreme Court of New York.<sup>27</sup> The idea of judges' routinely delivering written opinions had not been part of British practice and was not well established in America until the third decade of the nineteenth century.<sup>28</sup> It was nonetheless an idea with strong cultural roots, the United States Constitution being a written document and republican political theory being grounded on the sovereignty of the people and the idea of

25. See WILLIAM COLEMAN, *CASES OF PRACTICE ADJUDGED IN THE SUPREME COURT OF THE STATE OF NEW YORK* (New York, Isaac Collins 1801); A.J. DALLAS, *REPORTS OF CASES RULED AND ADJUDGED IN THE COURTS OF PENNSYLVANIA* (Frederick C. Brightly ed., New York, Banks & Bros. 1889) (1790) (including some cases from the Supreme Court of the United States, which temporarily sat in Philadelphia); EPHRAIM KIRBY, *REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT* (Acorn Club 1933) (1789). For more detail on those early reports, see Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1297-98 (1985); and Langbein, *supra* note 3, at 573.

26. For more on the roles of early reporters, see THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 13, at 384-426; and Joyce, *supra* note 25.

27. See Langbein, *supra* note 3, at 572.

28. For a discussion on the lateness of written opinions in the early nineteenth century, see THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 13, at 386-87. This is not to say that no tradition of *reporting* opinions, as distinguished from writing them, existed in England. On the contrary, one of the reasons why American jurisdictions were relatively slow to develop their own official reports was the availability, and prestige, of English law reports, especially those containing decisions rendered before 1776. See JULIUS GOEBEL, JR., 1 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 6 (1971).



written laws. Writing opinions also played to Kent's personal strengths and enhanced the authority of his decisions.<sup>29</sup>

But written opinions were not much use to anyone, except the actual litigants in a case, unless they were also published. Kent was a moving force in establishing an official state reporter for New York. This process, which involved securing an appropriation for an annual salary from the state legislature and finding a person competent enough to summarize, annotate or emendate, and supervise the publication of court decisions with their accompanying opinions, took Kent some time, but by 1805, after a false start, Kent was able to shepherd the appointment of his friend, fellow Yale graduate, and ideological compatriot, William Johnson, as New York's official reporter. Johnson was eventually to publish reports of every case Kent decided as a member of the New York Supreme Court and as Chancellor from 1806 to 1823 (when he was forced into retirement along with Kent). He also even managed to publish accounts of Kent's decisions in the years from 1798 to 1805, these in the form of retrospective reports or digests.<sup>30</sup>

Early nineteenth-century Reporters did far more than simply record decisions and opinions for publication, adding headnote summaries. They acted as intermediaries between judges, litigants, and the reading public. Very few of the persons who read official volumes of reported cases had been in court when the cases were decided, but early nineteenth-century judges typically did not scruple to set forth the facts on which their opinions were based nor the

29. See Letter from James Kent to Thomas Washington (Oct. 6, 1828), in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 837, 843 (Association of Am. Law Sch. ed., 1907).

30. See WILLIAM JOHNSON, A DIGEST OF THE CASES DECIDED AND REPORTED IN THE SUPREME COURT OF JUDICATURE AND COURT FOR THE CORRECTION OF ERRORS, IN THE STATE OF NEW-YORK (Albany, E.F. Backus 1815); WILLIAM JOHNSON, REPORTS OF CASES ADJUDGED IN THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW YORK (Lorenzo B. Shepard ed., New York, Banks, Gould & Co. 1849) (1808-1812); WILLIAM JOHNSON, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF JUDICATURE, AND IN THE COURT FOR THE TRIAL OF IMPEACHMENTS AND THE CORRECTION OF ERRORS, IN THE STATE OF NEW-YORK (New York, Banks & Bros. 1864-1873) (1807-1824); WILLIAM JOHNSON, REPORTS OF CASES ADJUDGED IN THE COURT OF CHANCERY OF NEW-YORK (New York, Banks & Bros. 1873) (1816-1824).

Johnson was appointed the official reporter of New York State in 1805, replacing George Caines, the first occupant of that position. Caines published his own reports of cases covering the years 1803 and 1804. See GEORGE CAINES, NEW-YORK TERM REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THAT STATE (New York, I. Riley 1813-1814) (1804-1806). Kent had a very low opinion of Caines, both as a reporter and as a person, and was very close to Johnson. See *Kent's Necrologies*, *supra* note 4, at 202, 212-13 (quoting from letters and marginalia in Kent's papers). Kent dedicated his *Commentaries* to Johnson. See 1 KENT, *supra* note 2, at iii.

authorities buttressing their reasoning. Those jobs fell to the Reporters, who regularly took bare-bones judicial drafts, or even scattered remarks, and fashioned opinions themselves. The relationship of judges to Reporters was thus a very important part of the process of disseminating opinions, and Kent and Johnson were an extraordinarily compatible pair. The result was that when Kent left the Chancellorship in 1823 and began to write his *Commentaries*, Johnson had helped him assemble a very detailed corpus of his own decisions. In the years prior to Kent's retirement, Johnson's volumes had helped elevate Kent's reputation, making it more likely that prospective readers of the *Commentaries* might be impressed.

But for all of Johnson's dedicated (and largely anonymous) efforts, Kent's best publicist was Kent himself. Here we come to the central issues surrounding an assessment of Kent: What was it, precisely, that made his decisions, and his *Commentaries*, so successful? When a summary of American law is first published between 1826 and 1830, and has sufficient influence and marketability to be reprinted for the fourteenth time in 1898, the author has done something right. Only Holmes's *The Common Law*,<sup>31</sup> still in print 117 years after its original publication, and Blackstone's *Commentaries*, which had the benefit of no comparable competitive work for over fifty years,<sup>32</sup> outdistance Kent's treatise in longevity.

Kent scholars have approached the question of his influence from several angles.<sup>33</sup> Those most currently interesting appear to be the harmony of Kent's methodology with the didactic assumptions of republican thought,<sup>34</sup> the striking efficacy of his conceptions of the common law and legal science for nineteenth-century American

31. OLIVER WENDELL HOLMES, *THE COMMON LAW* (1881).

32. This is not to say that there were no treatises by American scholars on American law subjects. For a discussion of early nineteenth-century treatises, with numerous examples, see *THE MARSHALL COURT AND CULTURAL CHANGE*, *supra* note 13, at 81-104. It is rather to claim that no American treatise comparable to Blackstone's in its comprehensiveness of coverage and synthetic approach to a variety of common law subjects existed. Kent's *Commentaries* filled that niche.

33. In addition to those singled out in this essay, earlier scholarship focused on the nature of Kent's "conservatism" and his views on issues of political economy. See, e.g., Thomas P. Campbell, Jr., *Chancellor Kent, Chief Justice Marshall and the Steamboat Cases*, 25 *SYRACUSE L. REV.* 497 (1974); Joseph Dorfman, *Chancellor Kent and the Developing American Economy*, 61 *COLUM. L. REV.* 1290 (1961). Compare G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 44-50 (1st ed. 1976) with the identical pages in the second edition (1988) where I continued to suggest that the relationship between Kent's role as a judge and the protection of property rights was the defining theme of his career. By then *THE MARSHALL COURT AND CULTURAL CHANGE*, *supra* note 13, had appeared, but I guess I hadn't read it.

34. See Raack, *supra* note 13.

culture,<sup>35</sup> and his effective translation of a civilian, institutionalist tradition of “learned” legal writing, well established in eighteenth-century Europe, to an American setting.<sup>36</sup> I want to build upon each of these themes, and to suggest that an additional one be considered: the role of Kent, and other influential American treatise writers of the nineteenth century, as what I will call savants: professed interpreters of the essentialist, collected wisdom of the law and of its cultural context.

### III

In the third volume of the first edition of his *Commentaries*, Kent wrote the following passage:

My mind has been too long disciplined by the actual business of life, to indulge in general theory on law subjects, or to think it of much value. The first duty of a law book is to state the law *as it is*, truly and accurately, and then the reason or principle of it as far as it is known; and if the author be a lecturer or commentator, he may be more free in his observations on its history and character, and he ought to illustrate it by comparison with the institutions of other countries and ages, and, in strong cases, to point out its defects, to show its false doctrines, and modestly and temperately to suggest alterations and improvements. All this I have endeavored to do . . . but still the existing and leading rules ought to be laid open to the inspection of the lawyer and the scholar, with mathematical precision, and absolute certainty.<sup>37</sup>

I used this same passage in *The Marshall Court and Cultural Change* as an example of how Kent, part of a line of early American treatise writers, had subtly altered the posture of the commentator by surfacely subordinating a normative to a descriptive stance: “The first duty of a law book is to state the law *as it is*.”<sup>38</sup> Here I want to unpack it a little more extensively.

One feature of the passage needs attention at the outset. The passage supplies an illustration of why Holmes would have concluded that Kent “has no ideas except wrong ones.” Holmes believed that Kent’s assumption that the law “*as it is*” could be stated “with mathematical precision” was the fallacy that had driven mainstream American jurisprudence of the 1870s into a dead end. Holmes singled

35. See Carl F. Stychin, *The Commentaries of Chancellor James Kent and the Development of an American Common Law*, 37 AM. J. LEGAL HIST. 440 (1993).

36. See Langbein, *supra* note 3, at 585-93.

37. 3 KENT, *supra* note 2, at 88 n.b.

38. See THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 13, at 98-100.

out the work of his contemporary Christopher Columbus Langdell (who embodied “the powers of darkness”<sup>39</sup>) as an illustration of Kent’s fallacy in operation. Langdell proceeded as if “the life of the law” could be captured in a precise, mathematically inspired logic, a methodology in which disembodied juristic truths—collectively, the law as it was—were stated and applied. Holmes believed that the Kent-Langdell project was philosophically and historically naive and descriptively unsound.<sup>40</sup>

But suppose, despite Holmes’s critique, one were to grant Kent his starting assumptions. The law—and the passage makes clear that by “the law” Kent meant the legal rules laid down in American jurisdictions<sup>41</sup>—could be stated authoritatively and in an unvarnished fashion. The “reason or principle” supporting the law—once again, the passage makes clear that Kent meant a discernible set of collective justifications for common law rules—could be stated in a similar fashion. In addition, a particularly discerning synthesizer of “the law” was capable of propounding “the existing and leading rules” so that lawyers could inspect them as they would inspect mathematical formulas, treating them as precise and certain in their accuracy and as comparable to mathematical propositions in their predictive utility. Finally, a “lecturer or commentator”—that is, a person who was engaged in academic as well as practical study of the law—was entitled to interfuse the declarative portions of his synthesis of “the law” with historical and comparative parallels and, “in strong cases,”<sup>42</sup> with critiques of “defects” and “false doctrines” in the corpus

39. Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Apr. 10, 1881), in 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 16, 17 (Mark DeWolfe Howe ed., 1941).

40. Holmes had first used the phrase “[t]he life of the law has not been logic; it has been experience” in a book review of CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (Boston, Little, Brown, & Co. 2d ed. 1879). See Oliver Wendell Holmes, Jr., *Book Notice*, 14 AM. L. REV. 233, 234 (1880); see also WHITE, *supra* note 1, at 147-51.

41. Unlike later treatise writers, Kent did not produce treatises on separate legal fields. His working definition of “law” encompassed constitutional as well as common law, although it did not include, except by implication, a discussion of the small number of statutes that existed in America in the first two decades of the nineteenth century. Kent was aware that both state and federal statutes were subject to constitutional review and included United States Supreme Court decisions reviewing them as part of “the law.” See, e.g., 1 KENT, *supra* note 2, at 235-39 (discussing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)). But he did not devote any part of his *Commentaries* to a discussion of the relationship between statutes and common law doctrines.

42. By “strong cases” Kent meant contested cases in which a judge or a group of judges reasoned not only from authority but from “principle,” a class of reasoning which could include what later generations would call policy arguments. “Strong cases,” for Kent, might be roughly translated as “cases in which policy reasoning figured prominently” for moderns.

of American law.

Let us begin the process of recapturing Kent's intellectual world by focusing on the last of his assumptions. Where did this freedom in lecturers and commentators come from? Why were they permitted to infuse their declarative statements of "the law" with what amounted to academic excursions, some of them openly normative? Why didn't Kent find an obvious contradiction between the "duty" of one writing a law book to state the law "as it is" and the methodological and interpretive license he took to be granted to commentators? Once again, in the surfacing of an apparent anomaly, we find a clue to a lost world of thought and belief.<sup>43</sup>

Consider the following possible goals Kent might have projected for himself once he made the decision to publish his lectures to Columbia law students in the form of a book of commentaries on American law. He might well have wanted to make money, and he might have had in mind the very audience of lawyers, judges, and law students in search of published versions of "American law" that he had sought to reach through Johnson's reports. To reach that audience, Kent needed not only to "state the law *as it is*," but to perform that task in such a way as to convince its members to buy the particular statement he offered to them.

Making money thus went hand in hand, for Kent, with producing the sort of treatise which would function as a surrogate for the myriad, but largely inaccessible, sources of legal authority in early nineteenth-century America. His goal was to make his *Commentaries* the sort of book that would be indispensable to practitioners, judges, and students. We know how fully he achieved that goal. But how, precisely, did he do it? In particular, how was he able to achieve such a considerable commercial and juristic success with a book that contained "no general ideas, except wrong ones"?

Obviously Kent was not writing for the Holmeses in his audience. But were there any such persons? Holmes made his comments twenty-five years after Kent's death: Holmes himself once asserted that all ideas are dead after twenty years.<sup>44</sup> Could it be that

43. "When reading the works of an important thinker, look first for the apparent absurdities in the text and ask yourself how a sensible person could have written them." THOMAS S. KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* xii (1977).

44. There are several formulations of this thought in Holmes's correspondence. A more formal version is: "[A]ny idea that has been in the world for twenty years and has not perished has become a platitude although it was a revelation twenty years ago." *THE MIND AND FAITH OF JUSTICE HOLMES* 399-400 (Max Lerner ed., 1943).

Kent did have some general ideas that were perceived to be “right,” or at least resonant, by his intended audience? Of course: books do not have the impact of Kent’s *Commentaries* unless they convey, explicitly or implicitly, messages that resonate. What were those messages? And what gave a “lecturer or commentator”—not a judge, not a public official of any kind—the presumptive authority that might induce audiences to take his messages seriously?

A place to start with this last inquiry is the cultural status of didactic roles in early American culture. Several professions—that of the ministry, that of the Lyceum lecturer, that of the academician, that of the statesman orator—enhanced their status through didactic presentations to large groups of Americans. Most of those presentations were oral, in part because of widespread illiteracy and in part because of the difficulty of disseminating printed sources. Their cultural purpose can be characterized as the dissemination of knowledge and wisdom from elites to other citizens in a republican social order. Republicanism presupposed that sovereignty, and (theoretically) wisdom, lay in the collective people, but also that popular wisdom needed to be filtered through and refracted by elites. Didactic communication was a means by which wisdom was disseminated. The people could theoretically reject and revise the maxims and precepts in which they were being instructed, but in most cases were expected to learn and to follow them.<sup>45</sup>

Wisdom about law, however, could not wholly take an oral form. This was because of the importance of a written constitution, and other written sources of legal authority, in a republican polity. Tyranny and arbitrariness in government were the endemic, besetting sins on which the republican model of governance was founded. Interested, passionate humans could not be trusted, once given power, to refrain from being demagogues or royals or brokers of corruption. They needed to be restrained not only by the structure of American constitutional government but also by legal sources of authority that any citizen could understand and invoke. It was not enough to have those sources located in the realms of custom and practice or in the collective memory of legal rules and obligations. Clever, self-serving officials could recast oral sources to their own advantage. The legal principles of republican government needed to be written down so that the sovereign people could educate

45. See DANIEL WALKER HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* (1979).

themselves and so that officeholders could not abuse their power.<sup>46</sup>

But, on the whole, the legal principles of republican government had not been written down. When Kent first began to lecture at Columbia he knew, with the searing awareness of any professor who finds no written help in preparing lectures, that "American law," in its published versions, amounted to Blackstone and a handful of reported decisions. By 1824 the written sources available to Kent had begun to proliferate, thanks in large part to his own efforts. But they were still meager. Nonetheless the importance of didactic communication had not lessened; in contrast, the growth and diffusion of population in America had increased its significance. Here was a major cultural opportunity: the role of authoritative didactic writer on American law. That was the very role Kent assumed with the publication of his *Commentaries*.

Conceiving the role and executing it were, of course, two different questions. Kent had considered the execution question well before his *Commentaries* began to take shape. He would state the law as it was, but he would do so as a commentator. He would embrace a methodology in which "the law" was retrieved and made "scientific" through purified analytical syntheses; one in which the commentator both served as a funnel for disembodied collective wisdom and improved upon that wisdom in his statements of it. He proceeded as if nothing inconsistent or paradoxical was contained in the simultaneous pursuit of those goals; as if a conception of commentary as glossing or "improving" on the legal doctrines one collected did not undermine a conception of law as an essentialist, predetermined entity, independent of the beliefs and values of those who promulgated it.

One cannot faithfully replicate Kent's jurisprudence, or understand his historical significance, if one proceeds on the assumption that his methodology was premised on an elementary jurisprudential error. We have a hard time recovering the state of mind in which a commentator could believe that he was documenting essentialist wisdom, as manifested in a series of common law rules, and at the same time occasionally tinkering with that wisdom—restating it in improved form or criticizing it—in order to present it to his audience in a more perfected form. Our difficulties say as much about us as about Kent. He assumed that as a certain breed of trained

46. See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 23-42 (1971); WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 13, at 111-22.

professional—a savant—he had special access to technical and recondite legal sources, and the same training that enabled him to distill those sources provided a justification for his occasionally “improving” upon their meaning.<sup>47</sup> But before pursuing Kent’s status as a savant in more detail, we need to look a little further into his major task as a commentator, that of distilling “the law.” Where did his distillations come from, and how did he think such a task was possible?

Intellectual life in the elite circles of Western culture<sup>48</sup> in the late eighteenth and early nineteenth centuries might appear, from the vantage points of our more professionalized, specialized, and information-saturated world, an arrogant, provincial, and status-ridden enterprise. And, comparatively speaking, it was. Kent was able to become a legal commentator, in important part, because—withstanding his anxiety about financial security—he had the money, the social status, and the attendant leisure to have access to a large number of books about law. Not only did few Americans of Kent’s time possess the resources necessary to consult numerous legal sources, only a handful of those could have made any sense of them. Kent was conspicuous among his peers in being interested in written sources of law and even more conspicuous in being able to digest them and to render them intelligibly in written form.

Discovery of this sort was a valued cultural enterprise for the high-status males whom Kent regarded as his peers. A sense that the world was opening up, and knowledge with it, helped drive the diverse intellectual explorations of Franklin, Jefferson, Crèvecoeur, deTocqueville, Gibbon, and Rush. Developments in transportation were helping facilitate the gathering of information, but intellectual discovery was also abetted by the belief that knowledge could be ordered in scientifically and philosophically harmonious and instructive terms. An intellectual explorer was not only able to expand the basis of his knowledge, but was able to organize and classify his data in fruitful and instructive ways, consistent with the truths about the natural world that investigation was helping to confirm.

47. For a discussion of the stance of commentators, see *THE MARSHALL COURT AND CULTURAL CHANGE*, *supra* note 13, at 98-100.

48. I am not suggesting that these cultural patterns were unique to late eighteenth- and early nineteenth-century Western culture, by which I mean the United States and Western Europe. My examples are drawn from nations whose legal sources Kent would have consulted. He could read Latin, French, and ancient Greek, but not Spanish, Eastern European, African, or Oriental languages. See *HORTON*, *supra* note 3, at 10, 23.



Late eighteenth- and early nineteenth-century American “science” should not be thought of as the equivalent of its Darwinist-inspired late nineteenth-century counterpart. “Natural philosophers” included what we would now call botanists, zoologists, geologists, and paleontologists. A scientist was a philosopher, and vice versa, because both explorers began their inquiries with the purpose of discovering, organizing, classifying, and ultimately explaining data. The explanatory systems, some of them derived from religious belief, were taken to be in place: discovery meant finding and making sense of the vastly increased body of data now available to humans. The enhanced availability of that data was not just a function of improved resources for gaining access to them, but also a function of perfected intellectual techniques for making sense of them.<sup>49</sup>

Kent took himself to be a legal scientist, and the common law to be a repository of scientific legal wisdom, in the above sense. He believed that the doctrines collectively promulgated in cases in the recurrent legal subject areas of his time amounted to a species of nascent scientific truth. At the same time, he knew, having attempted to collect and to organize case law decisions, that the returns from his searches were scattered. Having come to this realization very early in his career—at least by the time he attempted to put together his first series of law lectures at Columbia—he understood, as few of his American contemporaries did, the importance of written, published reports of judicial opinions. By the time he returned to Columbia to begin the project that led to his *Commentaries*, he had significantly increased his database, and, having been a judge with a consuming interest in producing his own written opinions, he knew how to find sources of legal authority.

None of Kent’s experience would have been much help in establishing him as an authoritative jurisprudential force in American law, however, had it not been for the governing presupposition of his contemporaries that the rules laid down, in those sources of common and constitutional law which a lawyer could consult or a commentator could gloss, were “the law.” Missing cases, or unreported decisions, did not pose significant jurisprudential problems. “The law,” in its various illustrations, was something that every American—with a little help from a commentator—could grasp. The authority of legal

49. For a discussion of late eighteenth- and early nineteenth-century legal science, see THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 13, at 144-55; and sources cited therein. See also Raack, *supra* note 13, at 363-65; Stychin, *supra* note 35, at 451-55.

principles came from their recurrent promulgation as well as from their essential "truth," that is their harmony with the same metaprinciples that implicitly ordered scientific and philosophical subjects in the first place.

But if "the law" was reflected in a continuous series of judge-declared rules, how did one preserve its integrity in the face of its being constantly repromulgated in new cases? Here again our contemporary instincts are likely to hinder a faithful recreation of Kent's jurisprudential universe. When Kent used the words "progress" and "improvement," he took them to be synonyms. He did not conceive of qualitative change over time to be a fundamental, defining feature of human societies; instead he equated change, progress, and improvement with the perfection of existing institutional structures, social orders, and systems of knowledge.<sup>50</sup> Kent's perspective is comparatively easy to glimpse if one focuses on his responses to the contested social and political issues of his day, but it may be harder to extract his perspective from his legal writings. In debates on questions of political economy, he took the mainstream Federalist republicanism of George Washington and John Marshall, with its emphasis on class politics, limited definitions of suffrage, antagonism toward state legislatures, and commitment to an enlightened, virtuous elite of civic-minded propertyholders, to be the defining political ideology of America. He then attempted to perfect that ideology by shoring it up against demagogic, leveling, and potentially corrupt oppositionist elements.<sup>51</sup> In taking these positions he regarded himself as being on the side of progress—improvement—not against it.

In his *Commentaries*, Kent assumed the same stance. In his distillations of common law rules he was regularly confronted with the unproblematic status of certain doctrinal formulations. These he took to be the equivalent of collective wisdom, a species of scientific truth. Where a rule or doctrine was unproblematic, the job of the commentator was to reconcile new decisions with it. If some new decisions were irreconcilable, but the rule was entrenched and its justifications readily apparent, the new decisions needed to be discarded as errors: in such a fashion the law was improved or

50. For a discussion of early nineteenth-century attitudes toward qualitative change, see *THE MARSHALL COURT AND CULTURAL CHANGE*, *supra* note 13, at 6-9.

51. As an example, see Kent's response to the legal and political issues raised by the New York State Constitutional Convention of 1821, which resulted in revisions of that state's constitution. His response is described in HORTON, *supra* note 3, at 245-59.

perfected. Such occasions were rare for Kent, however, because the methodology of his *Commentaries* was selective, not exhaustive. He read a great many cases, but not all the reported cases of his time, and he did not need to include all the cases he read in his syntheses. When confronted with an abhorrent decision, he could conclude it was not worthy of mention.

More difficult choices were posed by two other sets of synthetic exercises. One was where an established common law rule appeared to be not being followed, or being modified, in recent cases. Here Kent made use of a conventional distinction employed by jurists of his time. When a judge or a commentator was confronted with the application of a rule to a case where it seemed to have an awkward fit, or where another, possibly competing, rule seemed apposite, he could appeal to "principle" as well as to "authority." The latter appeal consisted of the sort of didactic compilation and discussion of other decisions in which the rule had been invoked that was characteristic of much of Kent's *Commentaries*. The former appeal went beyond that technique to probe "the reason" animating an established rule. By "reason or principle," Kent and his contemporaries meant what on the surface we would call "policy," but what they ultimately meant was metapolitics: the assumed nature of things, the starting social and political presuppositions from which they sought to make sense of their experience.

Reasoning from "principle" in what Kent called "strong" cases provided an opportunity for perfecting the law. In deciding whether to retain or to modify an established rule whose application to a given case seemed intuitively problematic, one probed the intellectual justifications for that rule. In so doing, one reminded oneself of how strongly those justifications resonated in contemporary America, or, alternatively, that those justifications now seemed less compatible with the current world. If the justifications continued to resonate, the law would be "improved" if the application of the established rule to the new case was grounded not only on authority but also on a reinvigorated statement of "principle." If the justifications did not resonate, the abandonment of the rule, and the substitution of an alternative rule, would also be an improvement. The law was not so much changing as perfecting itself.

This article has thus far explored the harmony of didactic writing in American republican culture with the conceptions of intellectual discovery and legal science that were dominant in Kent's time and attempted to show how Kent drew upon both these traditions to

address some of the jurisprudential puzzles he encountered as a commentator. We have not yet addressed another role ascribed to Kent by scholars: that of a legal writer in the tradition of European institutionalists.<sup>52</sup>

Kent was the first American jurist to make extensive use of European sources as a commentator. He was aware of Blackstone's reliance on Roman law in his *Commentaries on the Law of England*, and he had copies of French and Dutch institutionalist writers in his library.<sup>53</sup> Kent's typical treatment of European sources in his *Commentaries* was in connection with a contested American common law rule, where he invoked those sources, and sometimes European decisions they cited, in connection with an argument from "authority" or "principle."<sup>54</sup> John Langbein has argued, however, that Kent did more than rely on institutionalist sources; he patterned his *Commentaries* after the European institutes.<sup>55</sup> In particular, Langbein points to the breadth of Kent's subject matter, his focus on a national legal system, his didactic purpose, and his category-dominated methodological orientation as characteristic of institutionalist literature.<sup>56</sup>

The most impressive dimension of Langbein's argument, for me, is that he highlights an important difference between Kent's *Commentaries* and the thrust of subsequent nineteenth-century American legal commentary issued by Americans. When Kent died in 1847 no one else had attempted a comprehensive treatment of "American law," and Kent's remained the only such treatment when its fourteenth edition appeared. Even those writers whose subject matter coverage rivaled, or even exceeded, that of Kent—the most prominent of whom was Joseph Story—issued books organized

52. Langbein, *supra* note 3, at 585-88, argues that Kent's *Commentaries* can be seen as the last of a long tradition of "institutes"—comprehensive, didactic treatments of "the law" of particular nations—rather than as an early example of an American "treatise"—a similarly comprehensive treatment of a particular legal subject. I agree with Langbein that Kent drew heavily on the institutionalist tradition in his *Commentaries*. But it would be anachronistic to treat Kent's work as the equivalent of works produced in France, Holland, and Scotland in the seventeenth century. *But see id.* at 588-89. Langbein draws on the work of Alan Watson, who has regularly attempted to draw connections between the institutionalist genre in Roman law and seventeenth-century continental works. *See id.* at 585-86 (citing ALAN WATSON, *ROMAN LAW AND COMPARATIVE LAW* (1991)).

53. *See id.* at 590-92.

54. For an example taken at random, see Kent's discussion of the dower rights of women to real property in 4 KENT, *supra* note 2, at 47-58.

55. Langbein also argues that Blackstone's *Commentaries* "deserve[] to be seen as part of the institutionalist tradition." Langbein, *supra* note 3, at 590.

56. *See id.* at 586-87.

around separate legal subjects.<sup>57</sup> For Langbein, the decision to attempt a comprehensive treatment of a nation's legal system, rather than a treatment of a particular area of law, distinguishes "institutes" from "treatises," and enables Kent to be swept into the institutionalist camp. "Nobody ever again wrote a book like Kent's *Commentaries*," Langbein suggests, "because nobody needed one."<sup>58</sup>

The problem with Langbein's argument is that it proves too much. A book like Kent's *Commentaries* was written again after the *Commentaries* first appeared: Kent's book itself continued to be written, in the form of new editions, until the close of the nineteenth century.

Langbein's suggestions that the institutionalist genre disappeared because its nationalistic focus, its didacticism, and its breadth became outmoded do not seem plausible if one thinks of the success of McGuffey readers, the recurrent waves of xenophobia and chauvinism, or the continued heavy use of Blackstone and Kent as staples of legal education in the late nineteenth century. It appears that a number of American lawyers needed Kent, and responded to the cultural messages embodied in his *Commentaries*, from the 1820s through the Spanish-American War.

Langbein nonetheless seems to have grasped an essential feature of Kent's *Commentaries*: the writer's adopting a posture in which the synthetic presentation of legal rules is combined with an implicit metapolitical organization and a didactic purpose.<sup>59</sup> Although Kent divided his coverage into subject matter areas, there is a strong sense in his *Commentaries* that American "law" was all of a piece: that it reduced itself, on examination, to a series of recurrent, mutually complimentary, rules that were themselves surrogates for broader principles of social organization and political economy. Above all, it is this sense of *cultural authoritativeness in the commentator* that distinguishes Kent's *Commentaries* from the comprehensive treatises that followed them. In those volumes the commentator's authoritativeness is no less muted, but it is identified with expertise in a particular subject. Kent implicitly claims much more: the ability to

57. See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (Boston, Hillard, Gray, & Co. 1834); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston, Hillard, Gray, & Co. 1833); JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS (Cambridge, Hillard & Brown 1832). For a discussion of those treatises and earlier law books, see THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 13, at 81-111.

58. Langbein, *supra* note 3, at 593.

59. See *id.* at 586-87, 591-93.

propound, recast, and perfect the rules and principles of American law.

Thus we are brought, finally, to the personal and cultural factors that enabled Kent to succeed in making that claim plausible for over seventy years—if one counts posthumous editions as evidence of continued influence. To the extent that the ghost of the Chancellor still haunts us, it would seem to be in the capacity of a personage who once made his written work nearly synonymous with American law itself. Even allowing for his shrewdness as an entrepreneur, the fortuitous advantages he brought to his project, and the striking cultural need for the kind of book he could produce, Kent still had to convince his audience that his declarative, didactic syntheses were worth reading and taking as authoritative; that, in the informal vernacular of his day, he was worth attending. How did he pull that off?

#### IV

In exploring how Kent created and cemented his role as a savant, and the cultural importance of that role for early nineteenth-century America, I want to take up two additional extended passages from the *Commentaries*. One passage shows Kent on doctrinal ground he takes to be quite solid, although it looks like quicksand to us: the law of illegitimate children. The other pertains to one of the most treacherous legal, political, and philosophical issues of Kent's day: the legal status of what he called Indian tribes. In the forthcoming analysis of both passages, consider how the sort of reader inclined to pay close attention Kent's *Commentaries* in, say, 1830 might have reacted to them. Consider also, of course, the extreme vulnerability of Kent's formulations for us, a vulnerability brought about by time and the striking dissimilarities between Kent's America and ours. As elsewhere, we run the risk of misunderstanding Kent if we rush through the perceived gaps in his reasoning to make pejorative judgments.

I proceed next to examine the situation of illegitimate children, or bastards, who are begotten and born out of lawful wedlock.<sup>[60]</sup>

These unhappy fruits of illicit connexion were, by the civil and canon laws, made capable of being legitimated by the subsequent marriage of their parents; and this doctrine of legitimation prevails at this day, with different modifications, in France, Germany,

60. The passage being quoted is from 2 KENT, *supra* note 2, at 173-77 (footnotes omitted).

Holland, and Scotland.<sup>[61]</sup> But this principle has never been introduced into the English law; and Sir William Blackstone has elaborately and zealously maintained, in this respect, the superior policy of the common law. . . .<sup>[62]</sup>

. . . The opposition of the English barons to the introduction of the rule of the civil law [to which Kent had previously alluded in a discussion of English sources], is supposed to have arisen, not so much from any aversion to the principle itself, as to the sanction which would thereby be given to the superiority of the civil over their own common law. In the new civil code of France,<sup>[63]</sup> the rule of the civil law is adopted, provided the illegitimate children were not offspring of incestuous or adulterous intercourse, and were duly acknowledged by their parents before marriage, or in the act of celebration. . . .

But not only children born before marriage, but those that are born so long after the death of the husband, as to destroy all presumption of their being his; and, also, all children born during the long and continued absence of the husband, so that no access to the mother can be presumed, are reputed bastards. The question of the legitimacy or illegitimacy of the child of a married woman, is now regarded as a matter of fact, resting on presumptions going to establish a conclusion one way or the other, and it is a question for a jury to determine. . . .<sup>[64]</sup>

A bastard being, in the eye of our law, *nullius filius*,<sup>[65]</sup> . . . has no inheritable blood, and is incapable of inheriting as heir, either to his putative father, or his mother, or any one else, not can he have heirs but of his own body.<sup>[66]</sup> This rule, so far at least as it excludes him from inheriting as heir to his mother, is supposed to be founded partly in policy, to discourage illicit commerce between the sexes. . . . Bastards are, undoubtedly, incapable of taking in this

61. Kent's footnote, *id.* at 173 n.c, cited English, French, and Dutch sources, including a dissertation by a French commentator, Chancelier D'Aguesseau, on the principles of the French and Roman law as they pertained to illegitimate children.

62. See *id.* at 174 n.a (citing 1 BLACKSTONE, *supra* note 6, at 456).

63. Kent's footnote, *id.* at 174 n.d, cited sections in the Civil Code of France. Kent then added a paragraph in the text discussing a potentially "rigorous consequence" of the civil law doctrine that an illegitimate child could be legitimated by the subsequent marriage of its parents. In Holland, which followed the civil law doctrine, if A were to father a male child out of wedlock, and then father a male child by his wife, the illegitimate child could deprive the legitimate one of his inheritance should A's wife die and A marry the mother of the illegitimate child. See *id.* at 174-75.

64. Kent's footnote, *id.* at 175 n.b, cited a variety of sources, most of them from English cases or commentators. He added one reference to the French Code Napoleon. In the text, he added that "[i]t is not necessary that I should dwell more particularly on this branch of the law," noting that "the principles and reasoning" upon which the "doctrine of presumption applicable to the question of legitimacy" were founded would "be seen at large in the cases." *Id.* at 175.

65. "No child at all." Kent's footnote, *id.* at 175 n.c, was to 1 SIR EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON 123(a) (Francis Hargrave & Charles Butler eds., Philadelphia, Robert H. Small 1853) (1628).

66. Kent's footnote, 2 KENT, *supra* note 2, at 175 n.e, was to 1 BLACKSTONE, *supra* note 6, at 459.

state,[<sup>67</sup>] under our law of descents, which speaks of *lawful issue*, and we follow the rule of the English law; but in several of these United States, the rigor of the English law has been relaxed, and bastards can inherit to their mother equally as if they were her lawful children. . . . [<sup>68</sup>] These decisions rest on a very reasonable principle, that the relation of mother and child, which exists in this unhappy case, in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity. . . . With the exception of the right of inheritance and succession, bastards, by the English law, as well as by the laws of France, Spain, and Italy, are put upon an equal footing with their fellow subjects; [<sup>69</sup>] and in this country we have made very considerable advances towards giving them also the capacity to inherit, by admitting them to possess inheritable blood. We have, in this respect, followed the spirit of the laws of some of the ancient nations, who denied to bastards an equal share of their father's estate, (for that would be giving too much countenance to the indulgence of criminal desire,) but admitted them to a certain portion, and would not suffer them to be cast naked and destitute upon the world.[<sup>70</sup>]

In this passage we see Kent comfortably assuming an authoritative posture. He is in command of the sources, having investigated the legal status of illegitimate children in a number of American states, England, Holland, France, Spain, Italy, and ancient Greece and Rome, and having consulted commentary as well as cases. He takes his audience to agree with him on the tacit boundaries of his discussion. No one is going to ask the awkward question of why the state should care how a citizen disposes of his or her inheritance when the disposition involves persons born in or out of wedlock. No one is going to ask the equally awkward question of why a child should be penalized for the circumstances of his or her birth when he or she was only fortuitously associated with those circumstances. And certainly no one is going to ask why the entire discussion about the English common law of inheritance takes place against a backdrop in which

67. This reference reflected an apparent assumption on Kent's part that most of his readers would be residents of New York and may reflect the origins of his *Commentaries* in lectures to New York-based law students. Most of the citations to American cases in Kent's *Commentaries* were to New York cases, many of which Kent himself had decided.

68. Kent's footnote, 2 KENT, *supra* note 2, at 176 n.b, referred to cases in Indiana, North Carolina, Ohio, Tennessee, Vermont, and Virginia which he had extracted from *Griffith's Register*. He added a recent Connecticut decision, *Heath v. White*, 5 Conn. 228 (1824), in the text.

69. In support of this proposition Kent cited the Roman law ordinance of Justinian, several English cases, a Massachusetts case, a Connecticut case, Blackstone, Coke, and the French commentator D'Aguesseau. See 2 KENT, *supra* note 2, at 177 nn.c, d.

70. Kent's footnote, *id.* at 177 n.e, included references to English works on ancient Greece and Rome and a quotation from the Roman satirist Juvenal describing the goddess Fortune's protective attitude on discovering two naked, innocent foundlings in a public place.



female children cannot inherit at all if they have any male relatives. The policy choices highlighted in Kent's discussion—those pitting the state's purported obligation to create disincentives for persons to produce offspring outside of marriage against the state's purported obligation not to "suffer [illegitimate children] to be cast naked and destitute upon the world"—are interesting, contested choices once one sweeps the awkward questions away. And Kent does an impressive job of analyzing those choices.

Kent's initial presentation of the alternative legal treatments of illegitimacy, which introduces the less harsh civil law doctrine first and emphasizes that the origins of the English common law doctrine may have primarily been related to provincial stubbornness on the part of medieval barons, has the effect of isolating the English doctrine. The presentation appears balanced, however: Kent notes a potentially absurd consequence of following the civil law rule of subsequent legitimation and treats "lawful issue" in New York jurisprudence as necessarily meaning "lawful" within the meaning of the English common law.

The New York example, and the strong presumption that American jurisdictions will be guided by English common law that accompanies it, has the effect of suggesting that the "law as it is" in America will proceed from the proposition that an illegitimate child is no child at all, at least with respect to inheritability. But at the same time that Kent establishes this suggestion, he introduces reasons to doubt its efficacy. Some of the reasons emphasize the unfortunate predicament of illegitimate children, whose status has been arbitrarily imposed upon them. Kent began by calling them the "unhappy fruits" of liaisons out of wedlock; he now emphasizes that their incapacity to inherit can be determined even where the only evidence of their illegitimate status is that their putative fathers' paternity cannot easily be proven. He notes that as a *nullius filius* a child has no inheritable blood at all: he or she cannot succeed to an estate from anyone. And he points out that some American jurisdictions are beginning to relax the English rule, permitting illegitimate children to inherit from their mother.

At the same time Kent states the primary policy reason favoring the rigorous English rule: "to discourage illicit commerce between the sexes." Earlier he had noted that bastards were not only "unhappy" in their situation, but the offspring of an "illicit connexion." Kent's contemporaries entertained that policy argument mindful of the fact that birth control devices were limited; that pregnancy and childbirth

were often dangerous; that social status was a highly significant, and not particularly fluid, determinant of the quality of life; that sexual urges were fundamental; that government played a very small part in the maintenance of unwanted or destitute children; and that traditional religious beliefs strongly discouraged extramarital sexual activity. To state a societal concern with "illicit commerce between the sexes" was to conjure up all those associations.

Thus the policy choices, captured in Kent's description of illegitimate children as both being "unhappy" and the offspring of an "illicit" relationship, had been nicely posed for readers of the *Commentaries*. Kent then suggested that in America a resolution of the choice between the English and civil law treatments was already taking place. Even though his own jurisdiction followed the English rule in all its rigor, "in this country we have made very considerable advances towards giving [illegitimate children] . . . the capacity to inherit, by admitting them to possess inheritable blood." It is hard to know who Kent meant by "we" in that sentence: he had cited seven American state courts, a distinct minority even for 1826. But he followed up that sentence with the suggestion that although bastards should surely not be given an equal share of their fathers' estates, they could receive "a certain portion." In the light of this conclusion, Kent's entire discussion of the law of inheritance appeared as a careful exegesis of the continued importance, and ultimate unsoundness, of the rigorous English rule, but not a call for "too much countenance to the indulgence of criminal desire."<sup>71</sup>

Kent could have been confident, in his discussion of the law of illegitimate children, that neither he, his readers, nor early nineteenth-century American courts were likely to embrace any sweeping doctrinal changes. The success of that discussion had come from his mastery of the relevant sources and the subtlety of his attack on the doctrinal rule followed in his own state, and he had been advantaged, on both fronts, by the relatively narrow framework within which his contemporaries were inclined to discuss illegitimacy and inheritance. In contrast, Kent began his discussion of the law of real property with a central, and burning, issue: the legal and philosophical foundations of title to land, with special reference to the status of lands occupied by Indian tribes in America.<sup>72</sup>

71. Kent's choice of the word "criminal" to describe extramaritally directed sexual "desire" was yet another reminder of the associational baggage his contemporaries identified with extramarital sexual activity.

72. I analyze portions of the passage in 3 KENT, *supra* note 2, at 307-19.

At the time Kent was developing the lectures that would become his *Commentaries*, the Supreme Court of the United States was considering the legal status of titles to land occupied by Indian tribes. The question of that status was a momentous one, bringing to the surface contradictions at the core of American republican culture. A foundational value of republican thought, as it developed in America, was recognition of a prepolitical right in humans to own land and to enjoy the benefits of that ownership. Monarchies had denied that right by assigning all land to the crown and identifying all other landholders as tenants at royal sufferance, but English monarchical government had itself virtually abandoned that relationship, and American republicanism sought to abolish it entirely. Humans had certain inalienable rights before entering into patterns of social organization; government existed to secure such rights; holding and owning property, especially real property, was one of the rights to be secured.

The logic of republicanism thus pointed toward prepolitical ownership of land by the native American tribes who occupied that land when the first waves of European colonists settled in what was to become the United States. Indian tribes were composed of humans; those tribes were in possession of certain lands; by the standards of the English common law, they could justly exclude others from those lands and thus “owned,” or had title to, them. But there were certain difficulties. Most Indian tribes did not signal their “ownership” of land in the eighteenth- or early nineteenth-century European fashion, by transforming it from a wilderness state into something more suited to European notions of cultivation and extraction of natural products. Some did not settle on particular portions of land at all. And, most importantly, by the 1820s most native American tribes had either been forcibly dispossessed of their land or were in the process of being so.

It was comparatively easy for early nineteenth-century American jurists to analogize the forcible dispossession of Indian tribes from land they had occupied to the military conquest of one nation by another. In the early nineteenth-century law of nations the “discoveries” of non-European societies by Europeans had been quickly linked to military conquest, dispossession, and a transfer of sovereignty. The United States government, and the governments of individual states, were clearly in control of large amounts of land once inhabited by Indian tribes, and in many instances that control was a direct result of military conquest and forcible dispossession. But

where Indian titles were concerned, sovereignty in fact clashed with sovereignty in republican theory. The clash was illustrated by cases in which descendants of European settlers sought to enforce titles to land they had obtained from native tribes. In the Supreme Court case of *Johnson v. McIntosh*,<sup>73</sup> for example, a resident of Virginia claimed title to land that his father had obtained in a 1775 conveyance from the Piankeshaw tribe. The title was contested by a prospective settler who had been granted the land by the state of Virginia as part of an emolument for Revolutionary war service. That grant had taken place in 1784, so the settler's title could not prevail unless the previous title was to be treated as having no legal effect.

The Supreme Court, in a unanimous opinion written by Chief Justice John Marshall, concluded that although native American tribes were "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it," the "fundamental principle, that discovery gave exclusive title to those who made it" denied the tribes' "power to dispose of the soil at their own will, to whomsoever they pleased."<sup>74</sup> If this sounds like sophistry, it is. The tribes had a "legal as well as just claim" to own the land they inhabited, but nothing followed from that claim, not even a right of occupancy, since discovery led to conquest and thus to dispossession. The sophistry was required to resolve a fundamental contradiction between the purportedly universal scope of human rights under republican theory and the fact that Indian occupancy of land in America was incompatible with European patterns of settlement. Marshall offered two resolutions of that contradiction: abstract natural rights yielded to the positive laws of conquering nations, and native American tribes were not "humans" for the purposes of possessing inalienable natural rights. The former resolution, although endorsed by the Court in *Johnson v. McIntosh*, threatened to undermine the natural rights basis of republican government, and the latter resolution, put so baldly, was extremely awkward. Nonetheless Marshall and his contemporaries, mindful of the fact that the westward expansion of European settlers in America went hand in hand with the forcible dispossession of Indian tribes from land, felt they had no choice.<sup>75</sup>

In his discussion of the foundation of title to land, Kent

73. 21 U.S. (8 Wheat.) 543 (1823).

74. *Id.* at 574.

75. For a discussion of the views of Marshall, Joseph Story, James Madison, and other early nineteenth-century public figures on "the Indian question," see THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 13, at 703-38.

associated himself with the Marshall Court's resolutions. First he stated what he took to be the black-letter law of native American real property "rights":

Even with respect to the Indian reservation lands, of which they still retain the occupancy, the fee [simple title to the land] is supposed to reside in the state . . . . The nature of the Indian title to lands lying within the jurisdiction of a state, though entitled to be respected by all courts until it be legitimately extinguished, is not such as to be absolutely repugnant to a seisin in fee on the part of the government within whose jurisdiction the lands are situated. Such a claim may be consistently maintained, upon the principle which has been assumed, that the Indian title is reduced to mere occupancy.<sup>76</sup>

Next Kent set out to justify the reduction of tribal ownership of land from the legal status of an inalienable, prepolitical right to one of "mere occupancy." In *Johnson v. McIntosh*, Marshall had advanced several justifications for that conclusion; Kent set forth each of them and added some of his own. Most of Marshall's justifications have previously been mentioned. Kent combined a few of them in one striking excerpt:

In *Johnson v. M'Intosh*, it was stated as an historical fact, that on the discovery of this continent by the nations of Europe, the discovery was considered to have given to the government by whose subjects or authority it was made, the sole right of acquiring the soil from the natives as against all other European powers. Each nation claimed the right to regulate for itself, in exclusion of all others, the relation which was to subsist between the discoverer and the Indians. That relation necessarily impaired, to a considerable degree, the rights of the original inhabitants, and an ascendancy was asserted in consequence of the superior genius of the Europeans, founded on civilization and christianity, and of their superiority in the means, and in the art of war. . . . The United States adopted the same principle, and their exclusive right to extinguish the Indian title by purchase or conquest, and to grant the soil, and exercise such a degree of sovereignty as circumstances required, has never been judicially questioned.<sup>77</sup>

In Kent's hands the interconnectedness of European discovery, conquest, and sovereignty went from the status of jurisprudential theory to that of "historical fact." Not only had the "claim" by the discovering European nation to assert its own sovereignty over the lands it had discovered, and to establish its own relationship with the natives of the discovered continent, been taken as incontrovertible,

76. 3 KENT, *supra* note 2, at 308.

77. *Id.* at 309 (footnote omitted).

the diminution of the "rights of the original inhabitants" had also been taken to be necessary. But there were some additional reasons for the reduction of tribal rights in the lands they occupied to a nullity: "the superior genius of the Europeans" and "their superiority in the means, and in the art of war." Kent felt those reasons required some more elaboration.

The whites assert the right to a qualified dominion over the Indian tribes, and to regard them as enjoying no higher title to the soil than that founded on simple occupancy, and to be incompetent to transfer their title to any other power than the government which claims the jurisdiction of their territory by right of discovery. This assumed claim or right arises from the necessity of the case. To leave the Indians in possession of the country was to leave the country a wilderness, and to govern them as a distinct people, or to mix with them, and admit them to an intercommunity of privileges, was impossible under the circumstances of their relative condition. The peculiar character and habits of the Indian nations, rendered them incapable of sustaining any other relation with the whites than that of dependence and pupilage. There was no other way of dealing with them than that of keeping them separate, subordinate, and dependent, with a guardian care thrown around them for their protection. The rule that the Indian title was subordinate to the absolute, ultimate title of the government of the European colonists, and that the Indians were to be considered as occupants, and entitled to protection in peace in that character only, and incapable of transferring their right to others, was the best one that could be adopted with safety. The weak and helpless condition in which we found the Indians, and the immeasurable superiority of their civilized neighbours, would not admit of the application of any more liberal and equal doctrine to the case of Indian lands and contracts. It was founded on the pretension of converting the discovery of the country into a conquest, and it is now too late to draw into discussion the validity of that pretension, or the restrictions which it imposes. It is established by numerous compacts, treaties, laws, and ordinances, and founded on immemorial usage. The country has been colonized and settled, and is now held by that title. It is the law of the land, and no court of justice can permit the right to be disturbed by speculative reasonings on abstract rights.<sup>78</sup>

Our contemporary sensibility is likely to recoil from this excerpt. It combines a bald rationalization of a relationship created by military conquest with stereotyped, patronizing, and chauvinistic racial generalizations. It draws from the standard battery of specious legal arguments—the "necessity of the case" requires the seizure of Indian lands, a hypothetically dubious legal principle is now too established

78. *Id.* at 310-11.

to reexamine, subordination of a minority is for the minority's own good—in such a way as to confirm its own defensiveness, at least from the point of view of an instinctively hostile reader. But suppose, once again, we try to put ourselves in the place of Kent's contemporary readers.

On encountering this passage, a reader of the first edition of Kent's *Commentaries* might be expected to gain the impression that the anomalous status of Indian rights to freehold land was a settled jurisprudential proposition, all the more so because "the country has been colonized and settled, and is now held" in accordance with that proposition. But when Kent's first edition appeared, the Supreme Court's *Cherokee* cases, the Cherokee and Chickasaw tribes' dispossession from lands east of the Mississippi, the confrontations with the Navaho, Sioux, Apache, and Comanche tribes, the eventual subordination of the Utes and the Nez Pierce, and the imposition of federal Indian reservations were all in the future. The westward expansion of the American nation was to be a series of episodes in European colonization, settling, and holding of land formerly occupied by Indian tribes. Kent and his readers knew, in a general sense, that this future was coming. They might not have anticipated the Battle of Little Big Horn, but they had experienced the Louisiana Purchase. Lewis and Clark had returned from their expedition by 1807, and Nicholas Biddle's history of their journey had been published in 1814.<sup>79</sup>

So Kent's black-letter summaries of, and justifications for, the creation of an exception for lands owned by Indian tribes from the normally sacrosanct legal and political status of freehold ownership need to be seen as a carefully constructed blueprint for present and future policymaking in what came to be called "Indian affairs." Our

79. See NICHOLAS BIDDLE, *HISTORY OF THE EXPEDITION UNDER THE COMMAND OF CAPTAINS LEWIS AND CLARK, TO THE SOURCES OF THE MISSOURI, THENCE ACROSS THE ROCKY MOUNTAINS AND DOWN THE RIVER COLUMBIA TO THE PACIFIC OCEAN* (Paul Allen ed., Philadelphia, Bradford & Inskeep 1814); see STEPHEN E. AMBROSE, *UNDAUNTED COURAGE* 420, 480 (1997). And consider this excerpt from Kent's discussion of Indian titles:

If it were not for the frontier garrisons and troops of the United States, officered by correct and discreet men, there would probably be a state of constant hostility between the Indians, and the white borderers and hunters [occupying lands near those still occupied by tribes]. They covet the Indian hunting grounds, and they must have them; and the Indians will finally be compelled by circumstances, annoyed as they are from without, and with a constantly and rapidly diminishing population, and with increasing poverty and misery, to recede from all the habitable parts of the Mississippi valley, and its tributary streams, until they become essentially extinguished, or lost to the eye of the civilized world.

3 KENT, *supra* note 2, at 318 n.a.

current sense of dissonance toward those summaries and justifications should not be confused with the impact they had on Kent's contemporaries.

A very small minority of native Americans would have been among Kent's readers, and they had been accounted for as part of the group inclined toward "speculative reasonings on abstract rights."<sup>80</sup> The overwhelming number of his readers would have approached his discussion with a particular experience of, and consciousness about, Indian tribes. Their experience would have included a memory of hostile, sometimes violent, confrontations with tribes who had been their neighbors, or neighbors of their parents or grandparents. It would have also included a memory of the subjugation of those tribes, their dispossession, and the dramatically visual contrasts between their culture, social organization, religious practices, and personal styles and those of white Americans. It would have included another set of memories or current experiences: those of settlers on a vast continent, still primarily wilderness, identifying themselves with the land they owned and tried to transform into something resembling European-style fields, farms, and lots. If white settlers, with guns and axes and farm tools and carriages and books and steamboats, were oneself and one's peers, for Kent's original readers, native Indian tribes were other. They were not white; they were not settlers; they were not civilized; they were not militarily dominant; they were not enterprising in the European fashion. And they were in the way of American growth. Speculating about the awkward legal and philosophical dimensions of forcibly dispossessing the Indians of land they had inhabited before Kent's readers and their ancestors had come to America was, ultimately, pointless. Indians were the other; they could not "mix," they could only be eradicated or made wards of the state.

"If the settled doctrine on the subject of Indian rights and titles was now open for discussion," Kent concluded,

the reasonableness of it might be strongly vindicated on broad principles of policy and justice, drawn from the right of discovery; from the sounder claim of agricultural settlers over tribes of hunters; and from the loose and frail, if not absurd title of wandering savages to an immense continent, evidently designed by

80. For a discussion of a predominantly English-speaking, legally educated, "elite" segment of the Cherokee tribe, typified by John Ross, its chief from 1828 to 1866, see WILLIAM G. M'CLOUGHLIN, *CHEROKEES AND MISSIONARIES 1789-1839*, at 180-84, 213-31 (1984).



Providence to be subdued and cultivated, and to become the residence of civilized nations.<sup>81</sup>

He attempted to support each of these “broad principles of policy and justice” in the remaining portions of his discussion of native American land titles, invoking, among other justifications, the “true principles of natural law” which imposed obligations in the human race to cultivate the soil and not to “usurp more territory than [humans] can subdue and cultivate.”<sup>82</sup> Late twentieth-century readers will likely be inclined to regard Kent’s supportive arguments as hollow to the point of being embarrassing.<sup>83</sup> But Kent’s original readers took his general assessment of the experience of Indian-white relations in America to represent truth:

We [originally] found them, a numerous, enterprising, and proud spirited race; and we now find them, a feeble and degraded remnant, rapidly hastening to annihilation. The neighbourhood of the whites seems, hitherto, to have had an immoral influence upon Indian manners and habits, and to have destroyed all that was noble and elevated in the Indian character. They have generally, and with some very limited exceptions, been unable to share in the enjoyments, or to exist in the presence of civilization; and judging from their past history, the Indians of this continent appear to be destined, at no very distant period of time, to disappear with those vast forests which once covered the country, and the existence of which seems essential to their own.<sup>84</sup>

Kent and his original readers knew that the destiny of the American continent to be cultivated by persons of European origin was ineluctably intertwined with the destiny of Indian tribes to disappear from “the eye of the civilized world.”

## V

What common elements can we extract from the two lengthy passages analyzed above, and how can those elements help define Kent’s status as a savant? Despite the relative mundanity—to Kent’s contemporaries—of the issues raised in his discussion of illegitimate children and the central importance of those raised in his discussion

81. 3 KENT, *supra* note 2, at 312.

82. *Id.*

83. Two particularly arresting arguments were Kent’s claim that “[t]hough the conquest of the half civilized empires of Mexico and Peru was a palpable usurpation, and an act of atrocious injustice, the establishment of the French and English colonies in North America was entirely lawful,” and his assertion that “[t]he government of the United States, since the period of our independence, has . . . pursued a steady system of pacific, just, and paternal policy towards the Indians.” *Id.* at 313, 317.

84. *Id.* at 318.

of Indian titles to land, Kent's stance, to his original readers, appeared comparable. He was a commentator who was prepared to discuss not only authorities but arguments from principle and from policy, and he was not inclined to blink difficulties or to reveal what he took to be weaknesses in established doctrines. The last comment might seem preposterous if one takes a contemporary perspective on illegitimacy or the rights of native Americans: such a reader might well conclude that Kent's discussions blink *all* the difficulties. But to Kent's original readers, and to at least two subsequent generations of readers, his discussions revealed him as a legal writer who could grasp fundamental questions of social and political organization as they manifested themselves in rules of black-letter law. He not only saw the strains, the anomalies, and the fictions in established doctrine, he linked up those features to the major cultural issues, and the starting intellectual assumptions, of his educated early American peers. A contemporary reading Kent might find him occasionally strident or defensive when the probing of a doctrinal rule brought its metapolitical overtones rather too conspicuously to light. But few would have found his discussions other than stimulating. Far from having no general ideas, Kent was something of an embodiment of the general ideas of his time. Those ideas were a mix of philosophy, what passed for science, political economy, republican theory, and law. In his own fashion Kent was a disciple of "law and."

Kent's particular felicity in distilling the central intellectual questions that interested his elite contemporaries, and in demonstrating that those questions were implicated in the homeliest area of American common law, was the foremost source of his authority as a savant. To be sure, he had read a great deal more legal sources than nearly anyone else in America at the time, he had a knack for synthesis, he wrote elegantly within the canons of early nineteenth-century educated prose, and he had an instinctive ability to guide the reader without making his personality too obtrusive. These qualities alone would have served to produce a law book of distinction at a time when very few law books existed. But Kent produced a law book that made him wealthy and influential in his own lifetime, and has significantly contributed to the fact that we continue, occasionally, to try to take his measure. The difference between the sort of book that has great popular success in its day, and that which endures well beyond the lifetime of most books, is easily stated, though hardly easily replicated. The unusually enduring book, like Kent's *Commentaries*, somehow penetrates to the core issues

absorbing the culture in which it was written. Its penetration is sufficiently acute, and sufficiently deep, that it brings with it a little piece of that culture, and in the process helps emphasize that culture's affinities, or thought-provoking disaffinities, with our own.

Most of us should be enlarged by a visit with the Chancellor's Ghost. It might not be an entirely pleasant experience, but surely not a scary one.